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AUTHOR Hughes, Robert L.
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ABSTRACT

The 20 years following the "New York Times v. Sullivan" Supreme Court decision have seen an accelerating erosion of the protection necessary for the press to perform its function. The erosion has occurred in part because of unfavorable decisions of the substantive law. But in a very large measure it has also been because of uncertain and conflicting rules of state law or procedures, and the inhibiting impact on publishers who must be prepared to be taken to court in any of 51 jurisdictions and to explain their conduct in terms of whatever law is in force there. One possible solution is a federal libel law that could follow either of two models. The first would be a federal civil libel action pre-empting state libel laws. Under this model an aggrieved person would file his or her suit in federal court and a defendant, wherever located, would have the case tried under one uniform law. The second model would be for the Federal Congress to enact legislation to establish a floor of protection for libel defendants. The suit would be in state courts but plaintiffs would not be allowed to recover damages under state laws that did not meet the federally mandated minimum. Admittedly, these models are not without problems, but they should receive serious assessment as a mechanism for accomplishing what other means have as yet failed to do. (HOD)

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TWENTY YEARS AFTER NEW YORK TIMES V. SULLIVAN
(AND TEN YEARS AFTER GERTZ V. WELCH),
IT'S TIME TO SEEK RELIEF IN CONGRESS
FROM BAD CONSTITUTIONAL LAW

A Paper

by

Robert L. Hughes
School of Mass Communications
Virginia Commonwealth University
Richmond, Virginia

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During this twentieth anniversary of New York Times v. Sullivan¹ many retrospective articles² and professional gatherings³, marked by both nostalgia and handwringing, have reviewed the seminal decision that freed the media from the tyranny of common law libel.

That case and a handful of successors⁴ that followed soon after represented the high-water mark of constitutional protection. Indeed, libel law was considered all but buried after Sullivan. But the promise of the case has never been fulfilled. Libel law is very much alive and treacherous. As a federal judge wrote: the Sullivan case and its progeny "no longer provide meaningful protection to the media in defamation cases."⁵ While a media defendant in a libel case has a high probability of eventually prevailing, the costs in both human and financial terms are unacceptable in a society that highly values a vigorous marketplace of ideas. It is, after all, this marketplace that ultimately suffers.

Attention would be better paid to this tenth anniversary of Gertz v. Robert Welch Inc.⁶ which signaled the start of the retreat that shows no signs of slowing. In fact, a Burger Court majority has decided but one libel case in favor of a media defendant⁷. It is Justice William Rehnquist--not Justice William Brennan, the author of Sullivan--whose voice most often represents the Court in First Amendment matters today. Writing for a unanimous Court in two libel media libel cases⁸ decided during the October 1983 term, Justice Rehnquist in tone, as well as substance, offered only an unpromising view of the future

of libel. Few could miss the sarcasm in the Court's rejecting "categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper..."⁹

This paper examines the disarray that is libel law today and proposes that a federal libel law be enacted or, alternately, a model libel law be drafted and presented to the states. Two decades after Sullivan, it is no longer reasonable to suppose that the courts, even if they were willing to try, will resolve the complexities, inconsistencies and other difficulties of defamation into a coherent body of substantive and procedural law, protecting fundamental First Amendment interests. Rather, each year compounds the problem. Case by case adjudication has not, and perhaps cannot, construct a workable solution.

The media are unable to avoid some measure of blame for the situation in which they now find themselves. Too frequently they are reluctant to consider any alternative to making the same constitutional arguments to the same courts again and again and having them rejected again and again. This is not to suggest that efforts to persuade the judicial branch ought to be abandoned, but to propose that a parallel approach be made to the legislative branch. While the media, often awash in self-pity¹⁰, wait for the courts to cast the First Amendment in precisely the mold the media want it, incalculable damage is being done.

The Constitutional Cases

Breaking from a millenium of common law tradition¹¹, the U.S. Supreme Court in New York Times v. Sullivan upset an Alabama

judgment that held the newspaper responsible for a good-faith factual mistake. The Court declared that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open"¹² and established a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹³ Innocent or careless error was thus protected, for a constitutional doctrine shielding only truthful statements would not be effective to foster political debate, a central purpose of the First Amendment.¹⁴ "[E]rroneous statement," the Court said, "is inevitable in free debate."¹⁵ Had the Court not taken this step, only keeping quiet about public officials could promise absolute safety.

Because the decision was limited generally to the facts of that specific controversy, as is customary, two classes of questions were left for another day. The first required fleshing out the details of the new doctrine. Who, for example, is a public official? The second was to delineate to what extent, if at all, the rule applied to libel plaintiffs other than public officials.

In a series of cases following Sullivan, the Court embarked on a course that promised a speedy maturation of a substantive doctrine as well as the development of rigorous and uniform procedural principles that promote legal clarity and

predictability. Rosenblatt v. Baer¹⁶ clarified the identity of a public official. Garrison v. Louisiana¹⁷ took an expansive view of the character of allegations that relate to official conduct. And "actual malice," the Court held, demanded "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."¹⁸

As to whether the Sullivan decision had implications beyond statements about public officials, the Court concluded that a national commitment to debate on public issues could not be rationally limited to a narrowly defined class of government employees. Thus, in 1967 Curtis Publishing Co. v. Butts¹⁹ held that a suit by a football coach, accused of fixing a game by a national magazine, was a "public figure," requiring application of the New York Times standard. In 1971, a plurality of the Court pushed the protection and predictability of the "actual malice" standard to what was to be its outer limit in Rosenbloom v. Metromedia, Inc.²⁰ In that case the plurality shifted its focus from the status of the person involved to the newsworthiness of the event itself. Thus the mantle of First Amendment protection was extended over the reporting of all matters of public interest, even if the subject was a private individual. Three years later the tide turned abruptly. Loose ends left by New York Times v. Sullivan began unravelling in Gertz v. Robert Welch, Inc.²¹ To a considerable extent this retreat reflected the changing membership of the court itself. Earl Warren, who had presided over New York Times and its immediate successors, left the Court in 1969. Warren E. Burger replaced Warren as Chief Justice, but it wasn't until President

Nixon appointed Justices Harry Blackmun and William Rehnquist that the institution was shaped into something identifiable as "The Burger Court."²²

Gertz repudiated the plurality opinion of Rosenbloom, and rejected the proposition that the protection afforded the media was dependent upon the public interest in the matter being reported upon. Reflecting a sense that the balance between the interest of free speech and the interest of individual reputation had tipped too far in favor of the former, the Gertz majority concluded:

"[S]tates should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual...so long as they do not impose liability without fault.

"This approach provides a more equitable boundary between competing interests involved here. It recognizes the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and the broadcast media from the rigor of strict liability for defamation."²³

Gertz was not a complete reversal. As compared to the common law of libel, the decision contained positive aspects. It clearly abolished the common law's strict liability, at least for media defendants. And even when the plaintiff was neither a public official or public figure, the decision mandated a showing of

"actual malice" in every case in which punitive damages were awarded²⁴. Finally, there was the far-reaching dictum that statements of pure comment or opinion were constitutionally immunized from liability.²⁵

Conceived as a mechanism for a reasoned balancing of legitimate reputational interests of private persons against the need for breathing space in reporting and commenting on matters of public importance, Gertz arguably has merit in broad terms. There are, after all, other constitutional rights other than freedom of the press.²⁶ In practice, though, Gertz has failed. A decade of judicial attempts to translate the doctrine into a workable set of legal rules has not only sowed more confusion than the Court has managed to resolve, it has had a demonstrably intimidating effect on the media.²⁷

Unanswered Questions

The catalog of ambiguities and other flaws in constitutional libel today is lengthy. The object here is not to offer a comprehensive list, but to illustrate the depth and breadth of the problems, both substantive and procedural.

Substantive difficulties include the categorizing plaintiffs as public or private; variances in the degree of fault required to be shown by a private plaintiff; the uncertain existence of a neutral reportage privilege²⁸; the distinction between expressions of opinion and statements of fact.

In Gertz, to illustrate one of these, the Court declared, "Under the First Amendment there is no such thing as a false opinion. However pernicious an idea may seem, we depend for its

correction not on the conscience of judges and juries, but on the competition of other ideas."²⁹ Having said that, the Court has failed to provide any effective guidance on what constitutes an opinion. Opinions in state courts discuss "pure opinions"³⁰ and "mixed opinions"³¹ without regard to consistency or predictability³². Both journalists and courts founder in a definitional swamp.

Similar ambiguity confronts a person who tries to determine the shadowy boundary between a public figure and private person. The U.S. Supreme Court attempted to add some gloss to that aspect of the Gertz decision in Hutchinson v. Proxmire³³ and Wolston v. Reader's Digest³⁴. But the clarifications are at best marginal and those the Court did produce all but disregard the First Amendment side of the balance scale.³⁵

Numerous other questions remain unsettled. On any of them the outcome of a suit may turn: for example, the scope of common law privilege³⁶, the effect of retractions³⁷, the existence of a special privilege for broadcasters³⁸, varying statutes of limitations³⁹.

Though probably somewhat less visible to many professional journalists, the lack of predictability in the procedural law of libel has an effect at least as destructive as the substantive weaknesses. Even a matter as basic as whether a plaintiff who is a private person must show the falsity of a statement, or if instead the defendant must obey the common law rule of proving truth, remains undecided.⁴⁰ Uncertainty about the extent of discovery permitted,⁴¹ the availability of summary judgment⁴², and the admissibility of expert testimony⁴³ are three other

procedural problems that can each have a devastating effect on the cost of the litigation, if not its ultimate resolution.

Even if there were one consistent, substantive standard of fault demanded when a private person is the plaintiff,⁴⁴ there remains the crucial procedural question of whether, for example, negligence is to be judged by a "reasonable man" standard or by some measure based on publishing industry norms.⁴⁵

These are not trivial questions. The problems of deciphering what is protected in the wake Gertz are especially acute for publications that circulate or gather information across state lines. If the District of Columbia is included, there are 51 distinct bodies of defamation law in the United States. What is permissible in one state may well be proscribed in the next one, but a publisher must be prepared to meet the standard of care and other requirements of each. ⁴⁶

Other Problems

In jurisdictions where some of the substantive questions exclusive to the law of libel have been resolved, enormous uncertainties in the general law. Compounding the inherent vagueness of a negligence standard⁴⁷, for example, is the usual rule that the fact-finder--ordinarily a jury--need be persuaded of the presence of negligence only by a "preponderance of the evidence," the least demanding measure of proof found in a U.S. trial court. One side of a controversy is said to have a preponderance of the evidence when its case is more believable than the other's. This allows a jury to make a legally correct decision, but at the same time entertain significant doubts that

it is the right one.

While this margin of error and the resulting wrongly decided cases are considered tolerable in the great run of civil suits,⁴⁸ there is precedent for demanding a greater degree of certitude in civil fact-finding in a narrow range of cases in which public policy does not favor the claim, including some tied to the First Amendment.⁴⁹ But since neither the U.S Supreme Court nor most states have imposed a more elevated standard of proof for a private-figure plaintiff in a defamation suit, inherent risks considered acceptable in the fact-finding process of an ordinary civil case make vigorous participation in the democratic processes a gambling proposition.

Serious questions can be raised about the efficacy of the jury itself in libel cases. In the last three years juries have returned verdicts of \$9.2 million against the Alton (Ill.) Telegraph, \$4.5 million against the San Francisco Examiner, \$1.6 million against the National Enquirer and \$26 million against Penthouse Magazine⁵⁰. Gen. William C. Westmoreland is asking for \$120 million.⁵¹ Whatever one thinks about the merits of the individual cases it is difficult to conceive of many other personal injuries justifying such staggering amounts.

There is also considerable evidence that libel law has become far too complex for jurors to comprehend or apply. In the case of Tavoulareas v. Washington Post et al⁵² the instructions to the jury, a stream of legal rules and definitions, took the judge nearly two hours to read. Some members of that jury later admitted the law baffled them.⁵³

Studies show the probability is high a media defendant will eventually prevail in a libel action. Professor Franklin found that media defendants were successful three-quarters of the time in having a libel suit dismissed before trial⁵⁴. Should the case go to trial, however, jurors find against media defendants 85 per cent of the time. When an adverse decision is appealed, as it almost always is, the plaintiff loses the judgment two-thirds of the time.⁵⁵ In sum, plaintiffs who sue the media keep judgments in five to ten percent of all libel cases which, according to Franklin, may be the most dismal performance for plaintiffs in all areas of tort law.⁵⁶

Yet a decision to publish a story that risks a libel suit is far more complex than a calculation of the likelihood of a suit actually being filed and the probability of its being won. Entering into the calculus is the enormous human toll defending any libel suit takes⁵⁷ and the vast expenditure of time and money.

The minimum cost of defending a full-scale libel suit is disquieting; just responding to the suit can drain a small publication's resources. Sued for \$1 million, a 5,000-circulation weekly recently had a case dismissed before trial. But its legal fees totaled \$6,000, half the previous year's gross profit.⁵⁸ By February, 1983, the estimated cost to CBS of defending the Westmoreland suit to that point was put at \$2 million, with the trial still months away.⁵⁹ ABC's spent an estimated \$7 million before settling a suit four months into the trial.⁶⁰ These enormous costs are not simply a function of the large amounts being sought by plaintiffs; they are a consequence

of the complexity of libel law and, as such, are themselves powerful arguments for clarifying the law.⁶¹

The Chilling Effect

That all of this intimidates the media is beyond doubt. If Justice Holmes was correct in stating that law is nothing more than "[t]he prophecies of what the court will do in fact,"⁶² there is frighteningly little law in the particulars of libel today. The very uncertainty is a formidable restraint of the media today.

Even in those instances where a publisher may be relatively confident of the law's vindicating a particular story, he or she may still steer clear of a story because of the demonstrated risk a jury either will not understand the law or apply it even-handedly. Or the publisher just may not want to bear the costs of a trial. The experiences of some newspapers, such as the once crusading Alton (Ill.) Telegraph, show there's little subtle about the chilling effect that follows a libel suit.

After settling the suit against it for \$1.4 million, caution, if not timidity, permeates the Telegraph's newsroom. Anonymous sources are banned from stories. Reporters consult more with editors before making outside contacts. Internal memoranda are kept to a minimum and notes are often destroyed. Some controversial stories are avoided. The Wall Street Journal reported that when someone called the Alton paper with a tip about misconduct in the sheriff's office, the editor decided against investigating: "Let someone else stick their neck out this time," he reportedly said.⁶³

Less dramatic but equally persuasive were the results of a questionnaire sent 150 daily newspaper managing editors.⁶⁴ While more than 80 per cent denied they were intimidated by court decisions hostile to the media, almost three out of four conceded they were "increasingly careful" when editing stories. Sixty percent said they checked potentially libelous passages with their publishers.⁶⁵

Jonathan Friendly of The New York Times reported a significant shift from investigative reporting into lower risk newsgathering by even large, financially secure newspapers.⁶⁶ "Libel suits or the fear of libel suits," he wrote, "is repeatedly described as the darkest cloud hanging over investigative journalism."⁶⁷

Reaction To The Erosion Of The Constitutional Privilege

The reaction of journalists and their lawyers to this decline in the constitutional privilege created by New York Times has been varied. Shifts in defense strategy are evident, especially a "back to the basics" movement.⁶⁸ For a considerable time after the tide turned against the media, the defense of a libel case focused almost exclusively on federal constitutional privilege. Today, reliance is increasingly being placed today on traditional common law arguments. Based on about 10 media cases in the state courts of Virginia, for example, it is the author's perception that the answer to a libel suit today that does not include a claim that the alleged statement is either not defamatory or is a protected expression of opinion is exceptional. As recently as five years ago these defenses were

often ignored or appended almost as an afterthought.⁶⁹

Associated with this renewed emphasis on common law is the increasing attention being paid to state constitutions. Most of have a provision protecting press interests. In a given case, defense counsel is now apt to weigh in with a state constitutional claim, virtually ignored in the past, in hope of obtaining a favorable ruling from state trial courts that often hold little enthusiasm for a federal constitutional defense.

Other steps to counter the decline of federal constitutional protection range from proposals to abolish the tort⁷⁰ or at least grant the media an absolute privilege when reporting on matters of public interest,⁷¹ to award corrections rather than damages in libel suits,⁷² to limit the role of the jury, and to eliminate punitive damages and awards for "mental anguish."⁷³

But most of the effort and attention is given to repeating the same arguments to the same courts that continue to reject them. Far too much energy has been invested analyzing what a court did in the last case and trying to predict what it will do in the next one at a cost of failing to adequately consider alternatives. Many of them, including that of enacting a federal libel law⁷⁴, deserve a fuller hearing than they have received from either journalists, educators or lawyers.

A Federal Libel Law

With respect to libel law, the experiences of the ten years since Gertz make plain it is unrealistic to suppose the Court will soon re-assert itself as the primary guardian of First Amendment press freedoms. The difficulties are centered in three

areas: The flaws of the substantive law, the weaknesses of the procedural law, and what should not be underestimated, the problems of having 51 different sets of both kinds of law. Nothing in the Court's decisions this term show any inclination to ameliorate this last group. Keeton v. Hustler⁷⁵ and Calder v. Jones⁷⁶ are precisely to the contrary. The first held that a publication may be sued in any state in which it regularly circulates; the latter held individual reporters and editors may be sued in distant states in which they publication circulates, although they themselves had never been there. Would not a national publisher be tempted to avoid writing about controversial subjects in a high-risk libel state⁷⁷ or gear all of its stories to be defensible in the state with the most plaintiff-oriented law?

Even if state courts were more accommodating, it is improbable, absent federal insistence, that enough uniformity could be obtained among them to minimize the legal in terrorem effect faced by publishers who must cope with the law of 51 jurisdictions. One must now look to the Congress to reinforce constitutional safeguards.

Congressional authority to enact a federal libel law lies in the Commerce Clause⁷⁸, a chief source of federal regulatory power and a significant limitation on state action. The U.S. Supreme Court early on interpreted the clause expansively.⁷⁹ In the view of Chief Justice John Marshall the power to regulate commerce extended to all activities having interstate impact, regardless of how indirect.⁸⁰

Congress now may regulate not only those activities having a direct effect on interstate commerce, but also individual acts that be be considered nationally significant in their cumulative effect. If a category of acts has national consequences, the fact that any individual act may be considered trivial is irrelevant.⁸¹ This "cumulative effect" principle has been relied upon by Congress to justify various laws including civil rights legislation.⁸² In Heart of Atlanta Motel, Inc., v. United States,⁸³ for example, the U.S. Supreme Court upheld the power of Congress to prohibit racial discrimination in places of public accommodation, despite the fact that the discrimination in this particular case had little direct impact on national commerce.⁸⁴ Similarly, the dimensions of the First Amendment interest at stake and the role of publishing and broadcasting⁸⁵ in interstate commerce justify the exercise of congressional authority over all libel actions involving a media defendant, even if the interstate involvement of some of the smaller media is tenuous.

A federal libel act could follow either of two models. The first would be a federal civil libel action pre-empting state libel laws. Under this model an aggrieved person would file his suit in federal court and a defendant, where-ever located, would have the case tried under one uniform law. Uniformity is not a virtue in and of itself. There could be a bad national libel law as well as a good one. But to the extent a uniform law, grounded in sound substantive and procedural principles, would remove a large measure of the uncertainty inherent in libel litigation today, it should be welcomed. Despite the magnitude of the drafting task, another advantage to this approach is that the

statute could be developed as a coherent, coordinated whole, which in one large step could in fact eliminate the disparities in the procedural and substantive rules among the states.

The second model would be for the Congress to enact legislation that established a floor of protection for libel defendants. The suit would be in state courts, but plaintiffs would not be allowed to recover damages under state laws that did not meet the federally mandated minimum. In effect, Congress would do the sort of thing the U.S. Supreme Court did in Gertz: allow, for example, the states to set their own standards of fault for a private person plaintiff so long as they did not adopt liability without fault.⁸⁶ The Senate Commerce Committee in March, 1984, approved a bill based on this model. The bill, S-44, would establish uniform product liability standards that would pre-empt state laws but would be enforced in state courts. The bill's supporters argued that the measure was needed to replace a multiplicity of state product liability awards that has lead to uncertainty, high damage awards and has driven up costs for businesses and consumers. The bill has been attacked, but not on the basis that it is unconstitutional.⁸⁷

A practical advantage of this model is that the problems could be approached step-by-step, that it would not be necessary to await a package solution for all of the problems before solving any of them. It might be decided that the most pressing problem is the disparity in the degree of fault required by a private-person plaintiff. Legislation mandating a uniform standard of "gross negligence"⁸⁸ or even "actual malice" could be

enacted without awaiting the resolution of the scores of other difficulties in adopting a comprehensive statute. A failure of this approach is that, for a lengthy period, many if not most of the problems that have been identified would remain. This would be especially true of changes in civil procedure--the statute of limitations, for example--which federalism has traditionally allocated to state government.⁸⁹ This track also risks the loss of the benefits of coordination that should be found in a comprehensive statute adopted as a package. In fact, different facets of a federal law, enacted piecemeal over a time, might actually work at cross purposes.

Problems In Adopting A Federal Libel Law

In addition to those difficulties specific to the two models just identified, the enactment of a federal libel law necessitates overcoming other doctrinal and practical problems.

There are limits to the reach of the Commerce Clause. Basing a national libel law on the Commerce Clause can be challenged as requiring a strained, if not radical, interpretation of that section of the Constitution. Yet, as was pointed out earlier, there is a substantial precedent in the Commerce Clause-based Civil Rights Act of 1964⁹⁰ for using it to secure fundamental freedoms. Also, while the analogy is imperfect, the Court has on several occasions invited state legislatures and the Congress to protect speech rights but passing laws to accomplish what the Court said the First Amendment does not.⁹¹ In other words, there is no reason to conclude that a federal libel law must of itself contain some

fatal constitutional defect.

But there are also political barriers to be overcome before legislative relief might be obtained. To be reckoned with are those who hold a conviction that Congress should defer to the traditional spheres of state autonomy and be exceedingly wary of federal intrusions into concerns that have historically been thought of as local.⁹² Whether the introduction of a federal libel act would trigger the emergence of a plaintiffs' lobby in opposition is unknown, but there can be little doubt the measure would face some opposition based on a generalized states' rights argument. Given the numbers and influence of the institutional interests likely to favor such legislation, however, a reasonable speculation is that this focused interest would outweigh undifferentiated opposition.

The media themselves should not be expected to speak with one voice. In some states a federal libel law might appear to be in some details a step backwards. It seems improbable, for example, that a national libel law would incorporate the innocent construction rule of Illinois⁹³ or the single instance rule of New York.⁹⁴

More substantial is the objection that a federal enactment would single out the institutional press and other media for First Amendment protection not enjoyed by non-media defendants, something opposed by a range of interests, including some of the media themselves. For example, while media organizations lobbied Congress heavily for legislation to prevent newsroom searches by law enforcement authorities, they sought a ban on searches of the premises of all innocent third parties, not just themselves.

They were troubled by the notion that they were dependent on a legislative privilege that could be altered or revoked. What was enacted was legislation specific to them.⁹⁵ Laws such as that, though, are not unique on either the state or federal levels.⁹⁶ Gertz itself refers to the rights of the press specifically on repeated occasions⁹⁷, suggesting to many authorities that non-media defendants have not been liberated from the common law.⁹⁸ Thus, in a conceptual sense a federal libel law would hardly be breaking new ground.

Summary And Conclusion

This has been only an introduction, a broad-brush presentation of an intricately complicated and interwoven topic. For a full exploration, each of the subtle and troubling details of a federal libel law must await another day and forum.

Two points should be unmistakable though: The twenty years following the Sullivan decision have seen an accelerating erosion of the protection necessary for the press to perform its function. The erosion has occurred in part on account of unfavorable decisions of the substantive law. But in a very large measure it has also been because of uncertain and conflicting rules of state law or procedure, and the inhibiting impact on a publishers who must be prepared to be hauled into court in any of 51 jurisdictions and to explain their conduct in terms of whatever law is in force there.

The second point is this. The vast number of words, in popular and scholarly articles and in a steady stream of legal briefs and decisions, has had an imperceptible effect on a trend

that, if continued, promises to debilitate the meaning of the First Amendment's press clause. More of the same is no longer enough, although it is not suggested that legal arguments in the courts cease. To argue for a statute is not to concede the constitutional battle. (Journalists and their lawyers have hardly stopped making First Amendment access arguments on account of the availability of freedom of information acts.) What is proposed is that a federal libel law, or alternatively a model state libel act⁹⁹, receive a serious assessment as a mechanism for accomplishing what these other means as yet have failed to do.

NOTES

- 1 376 U.S. 254(1974).
- 2 E.g, Martin Garbus, "New Challenge to Press Freedom," The New York Times Magazine, January 29, 1984, pp. 34-49.
- 3 E.g., The Practising Law Institute held a conference, "New York Times v. Sullivan: The Next Twenty Years," March 8 and 9, 1984, in New York City. A conference, "Libel Law Under the Constitution: Marking the Twentieth Anniversary of New York Times v. Sullivan," sponsored by the American Bar Association, American Newspaper Publishers Association and American Society of Newspaper Editors was held on April 13, 1984 in Washington, D.C.
- 4 E.g., Curtis Publishing Co. v. Butts, 388 U.S. 130(1967); Associated Press v. Walker, 388 U.S. 130(1967); Rosenbloom v. Metromedia, 403 U.S. 29(1971).
- 5 Irving R. Kaufman, "The Media and Juries," New York Times, November 4, 1982. Judge Kaufman added: "Individuals displeased with coverage of their affairs have a potent weapon if they seek retribution through the courts. Even if they do not prevail at trial they will have succeeded in coercing the media to absorb the burden and expense of prolonged litigation. Id. Judge Kaufman sits on the United States Court of Appeals for the Second Circuit.
- 6 418 U.S. 323(1974).
- 7 Bose Corp. v. Consumers Union, 52 U.S.L.W. 4513 (U.S. April 30, 1984). This decision affirmed the principle that appellate courts have an obligation to review findings of fact as well as law in

libel cases. (Strictly speaking, Bose involved product disparagement.) Many media lawyers and journalists hailed the decision. See, e.g., James E. Roper, "Supreme Court Rules on Libel, Editor & Publisher, May 5, 1984, p. 15. While it is, after all, better to win a case than lose one, Bose is hardly a mandate for First Amendment principles. Only five justices--Stevens, Brennan, Marshall, Blackmun and Powell--subscribed to the opinion of the Court. Chief Justice Burger concurred in the result for reasons he kept to himself; White, Rehnquist and O'Connor dissented. When one looks at which justices might be expected to leave the Court in the foreseeable future and which might be expected to remain, it is difficult to be especially enthusiastic about this 5-1-3 decision.

8 This paper reflects developments through May 19, 1984.

9 Two of three libel cases before the U.S. Supreme Court during the October, 1983, term were decided against the media. Keeton v. Hustler, 10 Med. L. Rep. 1405 (U.S. 1984) and Calder v. Jones, 10 Med. L. Rep. 1401 (U.S. 1984) held, respectively, that publications may be sued in any state in which the publication regularly circulates, and that individual reporters and editors may be sued in distant states, even if they have never been there, when the publications they work for are widely circulated there. The third case, Bose v. Consumers Union, is discussed in note 7. The decisions were not surprises. See, e.g., "The Media Frets[sic] While Libel Cases Are Pondered," American Bar Association Journal 70:115-117 (February 1984).

10 Journalist Anthony Lewis makes this point, and others, in A. Lewis, "New York Times v. Sullivan Reconsidered: Time to Return

to 'The Central Meaning of the First Amendment'", Columbia Law Review 83:603-647 (1983).

11 The Laws of Alfred the Great (compiled around 880 A.D.) provided, "if anyone is guilty of public slander, and it is proved against him, it is to be compensated with no lighter penalty than cutting off of his tongue..." Laurence D. Eldridge, The Law of Defamation (Charlottesville: The Bobbs-Merrill Co., Inc., 1978) p. 4.

12 New York Times v. Sullivan, op. cit., p. 270.

13 Ibid., pp. 279-80.

14 Ibid., pp. 271-272.

15 Ibid.

16 383 U.S. 75(1966).

17 379 U.S. 64(1964). The case involved criminal, not civil libel. But the Court left no doubt that the rule was applicable to both. See also, Monitor Patriot Co. v. Roy, 401 U.S. 295 (1971) (a charge of criminal conduct is never irrelevant.)

18 St. Amant v. Thompson, 390 U.S. 727, 731(1968).

19 388 U.S. 130(1967). See also, Associated Press v. Walker, 388 U.S. 130(1967) (retired Army officer assumed a leadership role in racial controversy); Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6(1970) (real estate developer who sought zoning change); Monitor Patriot. v. Roy, 401 U.S. 265 (1971) (candidate in a primary election for U.S. Senator).

20 403 U.S. 29(1971).

21 418 U.S. 323(1974).

22 A comprehensive and still useful evaluation of the Burger

Court's attitude toward the First Amendment may be found in Archibald Cox, "Freedom of Expression In The Burger Court," Harvard Law Review 94:1-169 (November 1980).

23 Gertz v. Welsh, op cit., pp. 347-48.

24 Ibid., p. 350.

25 Ibid., pp. 339-40. One person who disagrees with this interpretation is Justice Rehnquist. Dissenting from the denial of certiorari in Miskovsky v. Oklahoma Publishing Co., 7 Med. L. Rep. 2607 (Okla. 1982), Rehnquist noted the state court's reliance on Gertz and contended that decision had not meant to pre-empt state common law libel regarding the issue of opinion. "I am confident," he wrote, "that this court did not intend to wipe out this 'rich and complex history' [of the common law's attempts to deal with opinion.]"

26 M. Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," Univ. of San Francisco Law Review, 18:1-49 (Fall 1983) collects numerous examples, particularly at pp. 14-18.

27 E.g. defamation and privacy. See generally, Laurence H. Tribe, American Constitutional Law (The Foundation Press, Inc., 1978), pp.966-973.

28 "[W]hen a responsible, prominent organization...makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges regardless of the reporter's private views regarding their validity..."

Edwards v. National Audubon Society, 556 F.2d 113, 120 (2d Cir. 1977). See generally, Harry W. Stonecipher, "Neutral Reportage Privilege Faces An Uncertain Future," Journalism Quarterly 59:367-89 (Autumn 1982).

29 Op cit., pp. 339-40. But see the view of Justice Rehnquist at note 25.

30 "These are expressions which commonly are regarded as incapable of adjudged 'true' or 'false' in any objective sense of those terms. Matters of personal taste, aesthetics, literary criticism, religious beliefs, moral convictions, political views, and social theories would all fall into that class." Ollman v. Evans, 9 Med. L. Rep. 1969, 1976 (D.C. Cir. 1983).

31 "Liability for libel may attach, however, when an negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader." Hotchner v. Castrillo-Puce, 551 F.2d 910, 913 (2d Cir. 1977), cert. den., 434 U.S. 834 (1977).

32 Some courts have concluded predictability here is impossible to achieve and state that the uncertainty can be resolved only on a case-by-case basis. E.g., Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462(1982).

33 443 U.S. 111(1979).

34 443 U.S. 157(1979).

35 Despite publishing and extensive involvement in the bar association, Gertz himself was held not to be a public figure. See also, Time Inc. v. Firestone, 424 U.S. 448(1976)

(Socialite's press conferences about her impending divorce did not give her public figure status.) Similar uncertainty concerns business executives, who file 20 per cent of all libel suits. Robert E. Drechsel and Deborah Moon, "Libel And The Business

Executive," Journalism Quarterly, 60:709-10 (Winter 1983).

Most authorities argue the Court has defined two kinds of public figures: (1) "Pervasive public figures" are public figures for all purposes and reach that status because either they occupy a position of continuing news value or because they generally exercise pervasive power and influence; (2) "Vortex public figures" are public figures only for the purpose of a particular controversy of public interest in which they have voluntarily become involved to effect its outcome. See e.g., Fred D. Sack, Libel, Slander and Related Problems (New York: Practising Law Institute, 1980). Where, one may ask, does an entertainer, such as Carol Burnett, fit into this constitutional scheme although most would intuitively characterize her as a public figure? In addition to the basic question, there are unresolved collateral issues such as the extent of notoriety necessary for a person to be classified as a pervasive public figure and the time lapse required for a public figure to recede from that status.

For a discussion of the little-examined time-lapse problem, see Williams v. Pasma, 656 P.2d 212 (Mont. 1982). See also, Brewer v. Memphis Publishing Co., 626 F.2d 1238(1980), cert. den., 452 U.S. 962(1981) (Plaintiff who once had entertainment fame in her own right was held to be a public figure in relation to newspaper article implying she was reviving a personal relationship with Elvis Presley.)

36 Considerable disparity exists among the states, for example, as to when privilege attaches to a document. In Virginia a qualified privilege is held to attach to fair and substantially accurate reports of public records as soon as they are filed.

Alexandria Gazette Corp. v. West, 198 Va. 154, 93 S.E.2d 274 (1956). Many states, on the other hand, require that in the case of a court record some judicial action have been taken on it before a report is privileged. E.g., Sanford v. Boston Herald-Traveler Corp., 318 Mass 156, 61 N.E.2d 5(1945), (merely filing a complaint is insufficient to establish the privilege.)

37 Legal rules of retractions vary widely. Although under the common law they were generally admissible in evidence to mitigate damages and under the constitutional privilege, they may now enable a defendant to escape liability entirely by demonstrating a lack of actual malice. Technical variations among state laws are crucial. E.g., under California law the National Enquirer was considered a magazine and because of a peculiarity of that state's statute, the fact that there was a retraction was irrelevant in Burnett v. National Enquirer, 7 Media L. Rep. 1321 (Cal. Ct. App., 1981).

38 A broadcaster's liability for live republications of the defamatory statements of another varies. A case holding the broadcaster responsible is Snowden v. Pearl River Broadcasting Company, 241 So.2d 405 (La. App), appeal denied, 259 La. 887, 253 So.2d 217(1971). For a contrary result see, Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976).

39 Most are short, one or two years. But two states, Rhode Island and New Hampshire, extend the statute to six years, making them attractive forums for plaintiffs in certain situations. See, Sack, op cit., p. 587.

40 Most courts appear to follow Wilson v. Scripps-Howard

Broadcasting Co., 642 F.2d 371 (6th Cir. 1981), cert. granted, 454 U.S. 962, cert. dismissed, 454 U.S. 1130(1981) (Plaintiff must prove falsity.) But a minority require the defendant to make an affirmative showing of truth. E.g., Mitchell v. Pittsburg Press, 7 Med. L. Rep. 2152 (Pa. Ct. CP 1981).

41 Though language in Herbert v. Lando, 441 U.S. 153(1979) hinted that First Amendment interests may limit the scope of discovery, the impact of the decision was to discount the need for any special protection for the editorial process.

42 Pre-trial disposition of a case by summary judgment removes the risk of a jury trial and reduces legal expenses, thereby reducing the chilling effect of a possible suit whose purpose is to harass. Since the U.S. Supreme Court's decision in Hutchinson v. Proxmire, op cit., however, summary judgment may be less available. In the now-famous footnote 9 of that decision, op cit. at p. 120 Chief Justice Burger suggested summary judgment may usually be improper for the complex issues of a defamation suit.

43 For the role of experts in libel trials, see, John Ullman, "Teachers' Testimony in Libel," Media Law Notes, April, 1983, pp. 4-8. The use and attendant costs of using expert witness is increasing. Libel Defense Resource Center Bulletin No. 8, . Sept. 30, 1983, pp. 74-75.

44 There isn't. After the invitation of the Court in Gertz to set their own fault standards for private individuals, so long as they do not adopt strict liability, 24 states have recognized a negligence standard; one follows a rule of gross negligence; four apparently adopted an actual malice standard; the rest have not clearly decided but are presumed to follow the negligence

standard. Libel Defense Resource Bulletin No. 6, March 15, 1983, pp. 35-40.

45 Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975), for example, adopted a "reasonably prudent publisher in the community standard" that has been followed apparently by a majority of courts facing the issue. But a minority of courts have followed the reasoning of Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292(1975) that rejected an approach which would permit the paper to establish its own standards." See, Communications Law 1983 (New York: Practising Law Institute, 1983), pp. 167-71, for illustrative cases.

46 The most useful summary of state defamation law can be found in the LDRC 50-State Survey 1983 (New York: Libel Defense Resource Center, 1983).

47 In Time, Inc. v. Firestone, op cit., the Court itself was badly split as to whether the news magazine actually had been negligent in reporting Mrs. Firestone's divorce. The majority appeared to measure the negligence of the reporter on the basis of the social value of the matter being reported upon. See generally, David A. Anderson, "A Response to Professor Robertson," Texas Law Review, 54:271(1976). See also, William L. Prosser, Law Of Torts (St. Paul: West Publishing Co., 1971), pp. 139-204.

48 The law allows a substantial margin of error in these because (1) neither the loss of liberty nor the stigma of a conviction is risked; (2) because over a time errors will divide equally between the plaintiff and the defendant and an error favoring one is no worse than an error favoring the other, and (3) a standard

less exacting than that of "beyond a reasonable doubt" in criminal cases speeds decision-making. See, generally, Fleming James Jr., Civil Procedure (Boston: Little, Brown and Co., Inc., 1965), pp. 248-255.

49 New York Times v. Sullivan, op cit., adopted a requirement that "actual malice" be shown by "clear and convincing" proof for precisely that reason. Ibid. at pp. 285-86. See also, Edward W. Clear, ed., McCormick's Handbook Of The Law Of Evidence (St. Paul: West Publishing Co., 1972), pp. 793-802.

50 See, generally, James C. Goodale, "The Tavoulareas Jury Verdict Provides a Chilling Lesson for the Press," Communications Lawyer (publication of the Forum Committee on Communications Law, American Bar Association) 1:3, p. 1 (Summer 1983).

51 Westmoreland v. CBS, 97 FRD 703 (D.C. S.N.Y.), 8 Media Law Rep. 2493(1983).

52 No. 83-1688, (CA DC 1984).

53 Stuart Taylor Jr., "Libel Law: A Tough Puzzle for Trial Jury," New York Times, May 5, 1983.

54 M. Franklin, op. cit., p. 4.

55 Id.

56 Ibid., p. 5. For supporting data see also, Libel Defense Resource Center Bulletin No. 2, September, 1982, p. 1.

57 See e.g., Clarence Morris, Modern Defamation Law (Philadelphia: American Law Institute, 1978), pp. 57-59; John Curley, "How Libel Suit Sapped The Crusading Spirit of a Small Newspaper," The Wall Street Journal, September 29, 1983, p. 1.

58 Curley, op cit., p. 1. See, also David A. Anderson, "Libel and Press Self-Censorship," Texas Law Review, 53:453(1975),

estimating the minimum cost of defending a full-scale libel suit at \$20,000 in 1975. The figure is unquestionably much higher today.

59 Garbus, op cit., p. 48.

60 Franklin, op. cit., p. 13.

61 Ibid., pp. 13-14.

62 Oliver Wendell Holmes, Collected Legal Papers (New York: Harcourt, Brace & World, Inc. 1920), p. 173.

63 Curley, op cit., p. 22. See also, "The Little Guy in the Big Suit," Columbia Journalism Review, Jan.-Feb. 1983, p. 42.

64 Douglas A. Anderson and Marianne Murdock, "Effects of Communication Law Decisions on Daily Newspaper Editors," Journalism Quarterly, 58:525-534 (Winter 1981).

65 Ibid., p. 527. See also, Franklin, op cit., pp.14-15.

66 New York Times, August 23, 1983.

67 Id. See also, Garbus, op cit.,

68 See e.g., Robert D. Sack, "Common Law Libel and the Press--A Primer" in Communications Law, 1983 (New York: Practising Law Institute, 1983), pp. 9-49.

69 A further examination and analysis of this observation is planned.

70 E.g., M. Garbus, "Abolish Libel--The Only Answer," The Nation, Oct. 8, 1983.

71 E.g., G. Cransberg, "ACLU Second Thoughts on Libel," Columbia Journalism Review, Jan.-Feb. 1983, pp.42-43.

72 Professor Franklin has proposed a "restorative action" as an alternative to damages. Franklin, op cit. pp. 35-49. Herald v.

Tornillo, 418 U.S. 241(1974) (prohibiting governmental intrusion into the editorial process through a right to reply law) would have to be reckoned with.

73 Martin Garbus, "New Challenge to Press Freedom," The New York Times Magazine, January 29, 1984, p. 49.

74 See, e.g., The News Media & The Law, Sept.-Oct. 1982, p. 3. Franklin, op cit. and others favor state legislative action: e.g., Jack Landau, head of the Reporters Committee for Freedom of the Press, quoted in "Media Lawyers Talk Shop at ANPA Clinic," Editor & Publisher, May 5, 1984, p. 44.

75 10 Med. L. Rep. 1405(U.S. 1984). Discussed at note 9.

76 10 Med. L. Rep. 1401(U.S. 1984). Discussed at note 9.

77 The National Association of Broadcasters, for example, charges a surcharge to libel insurance applicants from California, South Carolina and Oklahoma. Franklin, op cit., p. 20, note 98.

78 Article I, section 8, of the U.S. Constitution gives Congress the authority "to regulate Commerce... among the several states."

79 Gibbons v. Ogden, 22 U.S. (9 Wheat) 1(1824).

80 Ibid., p. 194.

81 See e.g., Wickard v. Filburn, 317 U.S. 111(1942) holding that Congress could control a farmer's garden for home consumption because the cumulative effect of this by many farmers would have an effect on interstate commerce.

82 E.g., Katzenback v. McClung, 379 U.S. 294(1964) holding the enforcement of a congressional prohibition against racial discrimination at a restaurant.

83 379 U.S. 241(1964).

84 See generally, Tribe, op cit., pp. 232-244.

85 There can be little doubt that the overwhelming majority of publications affect interstate commerce if they are not actually engaged in it. Because a relative handful may not should not defeat creation of a federal rule.

86 Gertz v. Welsh, Inc., op cit., p. 347.

87 "Bill Limiting Responsibility for Unsafe Products Voted," Congressional Quarterly, March 31, 1984, p. 708.

88 This level of fault, more demanding than simple negligence but falling short of actual malice, has been defined as "acting in a grossly irresponsible manner." Chapadeau v. Utica Observer-Dispatch, 38 NY2d 196, 341 N.E.2d 569(1975).

89 See generally, Tribe, op cit., pp. 15-18. Federalism--the allocation of authority that leaves states free to conduct their own affairs within the limits imposed by the Constitution--is especially protective of state judicial procedure. For the classic statement of federalism, see, New State Ice Co. v. Liebmann, 285 U.S. 262, 311(1932) (dissenting opinion of Justice Louis Brandeis).

90 42 U.S.C.A. Section 2000a.

91 See, e.g., Gertz. op cit., p. 347. See, also, Branzburg v. Hayes, 408 U.S. 665(1972), p. 706.

92 Tribe, op cit., pp.241-242. See also, federalism at note 89.

93 If a statement can be understood and a defamatory and a non-defamatory sense, a court as a matter of law must hold the publication to be non-actionable. Dauw v. Field Enterprises, 5

Med. L. Rep. 1983(1979).

94 Language charging a professional man with ignorance or mistake on a single occasion is not actionable unless special damages are proved. Browder v. New Republic, 7 Media L. Rep. 1605 (Sup. Ct. New York County 1981).

95 Donald M. Gillmor and Jerome A. Barron, Mass Communication Law, (St. Paul: West Publishing Co., 4d, 1984), pp. 430-431.

96 For a discussion of the issue see e.g., Branzburg v. Hayes, op cit. (denying a qualified privilege for journalists to withhold the identify of a source from a grand jury investigation.) But see, e.g., Justice Stewart, "Or of the Press," Hastings Law Journal 26:631, pp. 634-36(1975) (arguing that giving the press a special constitutional role would not present serious problems.)

The media have received special privileges both from state courts, see, e.g., In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979) (granting media authority to broadcast trials subject to certain safeguards), and the U.S. Congress, see, e.g., 18 U.S.C.A. sections 793 and following (prohibiting police searches of newsrooms except under limited conditions). See, also, Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1982), holding that the "Newspaper Preservation Act," 15 U.S.C.A. sections 1801 and following, contained no constitutional infirmities.

97 Gertz, op cit., pp. 325, 347 and 350.

98 E.g., Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056(1979), holding Gertz inapplicable in action by private individual against a non-media defendant. A libel case involving such a defendant was argued this term before the U.S. Supreme Court.

Dun and Bradstreet v. Greenmoor Builders, Inc., No. 83-18

(allegedly defamatory credit report.)

99 Model acts have been drafted in numerous areas, including libel, where there is a need for uniformity among the states. The Uniform Single Publication Act has been adopted by the states of Arizona, California, Idaho, Illinois, New Mexico, North Dakota and Pennsylvania. Sack, op cit., p. 91. Other such laws include the Uniform Probate Act; the Uniform Commercial Code. While this would not accomplish every objective of a federal law, a poor second choice is preferable to the present situation.